

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1977

Supreme Court, U. S.
FILED

APR 29 1977

MICHAEL RODAK, JR., CLERK

No.

76-1507

AUSBERT S. SANDOVAL,
Petitioner,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

SALT RIVER POWER DISTRICT,
Self-Insured Employer,
c/o SWETT & CRAWFORD,
Respondent Employer

PETITION FOR A WRIT OF CERTIORARI

CALVIN C. THUR
7020 E. Third Avenue,
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Attorney for Petitioner

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 PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ausbert S. Sandoval, respectfully requests that a Writ of Certiorari issue to review the Order of the Supreme Court of Arizona entered in this proceeding on February 1, 1977, denying Ausbert S. Sandoval's Petition for Review of the Opinion of the Arizona Court of Appeals in this proceeding.

OPINION BELOW

The Order of the Supreme Court of Arizona denying Petition for Review is Supreme Court Order No. 13020-PR. The Opinion of the Arizona Court of Appeals, which the Arizona Supreme Court refused to review, is reported at ___ Ariz.App. ___, 559 P.2d 688 (1976) and said report notes "Review Denied" by the Supreme Court of Arizona.

JURISDICTION

On August 31, 1973, the Salt River Power District terminated petitioner's Workmen's Compensation retroactively, and petitioner requested a hearing. A hearing was held on June 3, 1975, before a Hearing Officer, and on October 23, 1975 the Industrial Commission issued its Findings and Award. Following administrative review procedure, petitioner appealed by Certiorari to the Arizona Court of Appeals, which issued an Opinion on December 9, 1976. A Motion for Rehearing filed with the Court of Appeals was denied, and petitioner thereafter made a timely Petition for

Review to the Supreme Court of Arizona, which was denied on February 1, 1977, and this Petition for Certiorari was filed within 90 days of that date.

This Court's jurisdiction is involved under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether an injured workman under a Workmen's Compensation claim is denied due process and equal protection when, pursuant to the Arizona Statutes and administrative procedures of its Industrial Commission, the employer, a party in the proceedings, is permitted to unilaterally terminate or suspend payment of benefits for more than 3-1/2 years by ex parte proceedings.

2. Whether retroactive payment of all benefits which an injured employee will be entitled to affords due process to the employee who has not yet received the permanent compensation benefits that he was admittedly entitled to more than 3-1/2 years ago.

3. Do the administrative procedures and forms

of the Arizona Industrial Commission violate due process by permitting or requiring an employer to terminate temporary compensation benefits, as a prerequisite to a permanent award, by falsely stating in a Notice of Claim Status (which has res judicata effect if not objected to) that the injured employee "has returned to regular work without wage loss due to injury."?

4. Does a Notice of Claim Status terminating or suspending compensation, retroactively, first served upon employee's attorney about four months after termination violate due process?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Ausbert S. Sandoval, was seriously injured when an electrical tower collapsed, crushing his pelvic and abdominal region, on September 7, 1971, while in the employ of Salt River Power District, a self-insured employer under Arizona Workmen's Compensation Law. The case was accepted for benefits.

On August 31, 1973, the employer issued a Notice of Claim Status through its claim representative, Swett & Crawford, whereby compensation benefits were terminated retroactively to August 8, 1973, and medical benefits terminated retroactively to August 24, 1973. Said Notice stated in part "[i]f you are aggrieved by this notice, you may apply for a hearing by filing a written application . . . within sixty days" Said Notice stated specifically:

"Temporary compensation terminated on 8-8-73 because claimant has been released for, or has returned to, regular work without wage loss due to injury." [See Appendix A-1.]

Said statement was completely false and was known by Salt River Power District and by their representative, Swett & Crawford, to be completely false.

Such a Notice under Arizona law becomes res judicata if not objected to within 60 days. Taylor v. Industrial Commission, 20 Ariz.App. 46, 509 P.2d 1083 (1973); Parsons v. Industrial Commission, 108 Ariz. 130, 493 P.2d 913 (1972).

The true reason for terminating temporary compensation was because Sandoval's disability had become stationary and compensation for permanent compensation was due.

Joanne Lutz, who had signed the Notice of Claim Status for Swett & Crawford, admitted that there was no basis in fact for the finding that Sandoval was released for or had returned to regular work without wage loss due to injury. Ms. Lutz testified at the hearing on June 3, 1975, as follows:

"Q. Isn't it true that all of the reports that you received from Dr. Brainard indicated

that he could not go back to regular work?

"A. Indicated light -- light duty, yes.

* * * *

"Q. Can you tell me if you have any evidence whatsoever in your file that indicates that Mr. Sandoval was released for or returned to regular work without wage loss due to injury?

"A. No, I have nothing in the files to say that. . . ."

* * * *

"Q. Isn't it true that at the time that you had issued the Notice of August 31, 1973, you were aware that Mr. Sandoval had in fact a substantial loss in earning capacity due to his injury?

"A. Our files reflected he did. He was losing money, yes. . . ."

[Reporter's Transcript at 14-17.]

Mr. Sandoval testified about his physical condition and his ability to return to regular work or earn a living as follows:

"Q. [By Mr. Thurl Can you explain to us what those physical problems were that you were having in August of 1973?

"A. I was having a lot of pain in several areas of the body where I got injured.

There was mainly nerve damage that was done.

"Q. What parts of the body were affected?

"A. My leg, my hip, my knee, my shoulders, my stomach right here across to the chest.

"Q. With regards to your stomach, what problem were you having?

"A. They cut some nerves out that once in a while the nerve would go into spasms. . .
."

* * * *

"Q. And in August of 1973, what was your condition, or can you describe exactly what your problem was with your leg and hip?

"A. Well, it was very weak. The hip was very weak. It's always under pain because of the nerves or something happened to the nerves there. It has always been under pain.

* * * *

"Q. In August of 1973, do you know what your weight was at that time?

"A. I think I was just about 102 — 105 pounds.

"Q. What was your normal weight before your injury?

"A. About 140.

"Q. The abdominal surgery that they did on you, I believe the record shows that had something to do with your intestinal trouble or your stomach area; is that right?

"A. Correct.

"Q. Did that affect your eating habits and your dietary habits after that?

"A. Yes, and it drastically changed everything.

* * * *

"Q. At any time in August of 1973, had you returned to regular work without wage loss due to injury?

"A. No.

"Q. According to the records in the file, you apparently had sustained a substantial wage loss due to the injury, right?

"A. Yes.

"Q. In August of 1973, did you feel that there was anything further that the physicians could do for you at that time?

"A. I was hoping that they would do something. . . ."

[Reporter's Transcript at 38, line 20 through p. 40, line 24; and p. 41, lines 3-12.]

Swett & Crawford failed to send a copy of said

Notice of Claim Status to Sandoval's attorney.

When a copy of the Notice of August 31, 1973 was finally sent by Swett & Crawford to said attorney in January of 1974, Sandoval immediately, on January 14, 1974 filed Objections to the said Notice of Claim Status, and requested a hearing thereon. The employer did not object to the timeliness of the filing of the Objections and Request for Hearing made by Sandoval on January 14, 1974 relative to the Notice dated August 31, 1973, because of their failure to give timely notice to the Claimant's attorney. Before requesting a hearing Sandoval asked the employer to voluntarily correct the Notice, and employer's attorney responded on January 7, 1974 by suggesting that Sandoval "file a request for hearing." [See Appendix A-2.]

Sandoval has not received his compensation benefits from the defendant-employer from August of 1973 (more than 3-1/2 years), although he had remained in a disabled condition, had suffered an extensive wage loss as a result of the injuries

(determined to be a 77.92% reduction in earning capacity); and had been unable to obtain medical treatment because of the termination of his compensation benefits.¹ He had a wife and an 8-month old baby girl to support at the time his compensation was terminated. Eventually, on October 23, 1975, the Hearing Officer for the Industrial Commission of Arizona awarded Sandoval an additional 16 days compensation through August 24, 1973, but in all other respects denied the Claimant's Objections and Request for Relief from the erroneous and false Notice of Claim Status issued on August 31, 1973. On Review, the Hearing Officer affirmed his previous Decision and appeal by Writ of Certiorari was made to the Arizona Court of Appeals and the constitutional questions herein presented were raised.²

¹Note: At about the time the Employee's brief was due in the Arizona Court of Appeals (March, 1976) the Employer started making "voluntary payments" but only equal to 25% of his lost earnings and much less than Sandoval is entitled to.

²Opinion attached at Appendix A-5.

The employer thereafter attempted to justify the use of the false reason for terminating compensation by claiming that it had to use the forms provided by the Industrial Commission, and that the forms did not indicate the true reason.

The Arizona Court of Appeals justified the false reason for termination by stating:

"This form language was mandated for use by the Commission pursuant to Rules 6 and 7, Rules of Procedure for Workmen's Compensation hearings." (559 P.2d at 690.)

The Court then concluded that Sandoval's temporary benefits were "properly terminated" (559 P.2d at 691), and that the four month delay in service of the Notice did not prejudice Sandoval's due process rights (559 P.2d at 691).

The Court of Appeals held that the petitioner had a "meaningful" opportunity to be heard after the ex parte termination of temporary benefits because he gets "full retroactive relief if he ultimately prevails." The Arizona Supreme Court denied review on February 1, 1977. On March 28, 1977, the Industrial Commission finally made that

award and held that Petitioner sustained a 77.92% reduction in his monthly earning capacity and the Commission's Award stated:

"Compensation for unscheduled permanent partial disability under A.R.S. § 23-1044(c) and (d), in the sum of \$378.56 payable monthly, to continue until death or further order or award of this Commission, the first payment effective as of August, 1973;" [See Appendix A-3.]

The retroactive compensation from the date of the award back to August, 1973 amounts to approximately \$13,800, less about \$2,400 paid "voluntarily" by employer since March, 1976, but the petitioner has not yet received any retroactive compensation under said Award because the employer objected to the Award on April 1, 1977 [Appendix A-4], and to date there has been no hearing set.

REASONS FOR GRANTING THE WRIT

1. A State Workmen's Compensation Procedure Which Permits Unilateral and Retroactive Suspension of Compensation Benefits Without Affording a Hearing For Almost Two Years Violates Due Process and Equal Protection As Guaranteed By the United States Constitution, Amendment XIV, § 1.

Mr. Sandoval's right to Workmen's Compensation

vested when his case was accepted for benefits shortly after the injury of September 7, 1971. He had a vested right to such benefits, not only under the Arizona Workmen's Compensation Act, but also under the Arizona Constitution, Art. XVIII, § 8.

When a constitutionally protected right is involved, due process requires strict adherence to procedural safeguards for any state-implemented procedure which impairs such right, or which affects property or personal rights of citizens. Under some circumstances, due process requires the State to afford an evidentiary hearing to an interested party before discontinuing payment of benefits. See: Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 2018, 25 L.Ed.2d 287 (1970). Under other circumstances, it has been held that where stringent procedural safeguards exist, such as in the Social Security Administration, that a prior hearing before termination of benefits is not always required. Matthews v. Eldridge, ___ U.S.

___, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The Opinion of the Arizona Court of Appeals is contrary to the United States Supreme Court guidelines set forth in Dillard v. Industrial Commission of Virginia, 416 U.S. 783, 40 L.Ed.2d 540, 94 S.Ct. 2028 (1974).

In Dillard the majority decision expressed the view that if, under state law, a claimant whose Workmen's Compensation benefits were suspended may have them promptly reinstated by a state trial court pending a full administrative hearing on the merits, it is in all probability unnecessary to address any questions of federal constitutional law. The majority in Dillard based the decision upon the fact that, although under the Virginia procedures, it is possible for an employer or insurance carrier to terminate compensation, the employee has a ready mechanism for immediate reinstatement of benefits pending a full hearing, and the fact that a full hearing in Virginia normally follows suspension of benefits by a per-

iod of about one (1) month. The Dillard Court also emphasized the fact that in Virginia there are additional procedural safeguards so that a claimant could render suspension of benefits de minimis. None of the procedural safeguards mentioned in Dillard exist in Arizona, and the two (2) year period which passed from the time the employer issued the Notice of Claim Status, until the hearing was finally completed, and the three and one-half (3-1/2) years which has now passed without payment of permanent benefits to which the disabled employee is entitled, shows a constitutionally significant injury under the procedures used in Arizona.

The dissenting opinion in Dillard felt that even with the right of immediate reinstatement of an ex-parte suspension of benefits, and with a full hearing within one (1) month following the original suspension of benefits, there was a violation of due process guarantees under the XIV Amendment. The dissenting opinion stated:

"Any state remedy which places upon the worker the burden of going to court to redress a termination which has already occurred is simply not in point. It places the burden of affirmative action on that segment of society least able to bear it at a time which could not be less opportune. As Judge Merhige said below in dissent: 'Judges need not blind themselves to what they know as men. I cannot help but believe that the average working man in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and immediate loss. . . . The very thought that the ex parte proceeding permitted by Rule 13 may result in a cessation of milk delivery, or electric power, or fuel to a working man and his family, shocks my conscience.'

* * * *

"The opportunity for working-class men and women in that grave situation to enter state court and do battle with the corporate employers and insurers who have already terminated their benefits without a hearing is no meaningful solution to their problem."

[Emphasis ours.]

The ex-parte proceedings under which Salt River Power District was permitted to retroactively suspend or terminate payment of benefits for more than two years before the hearing was completed, and Sandoval being without benefits now for more than 3-1/2 years, clearly violate constitutional

guarantees. The majority in Dillard found that the right to immediate reinstatement of benefits pending a hearing and a hearing within about thirty (30) days, was not obnoxious to constitutional guarantees. In Arizona Sandoval had no right to immediate reinstatement of benefits pending a hearing, and it took about two years to get a hearing.

The Arizona Court of Appeals, in its Opinion, held that this Court's decision in Goldberg v. Kelly, supra, "has been weakened by subsequent United States Supreme Court Decisions," and referred to Matthews v. Eldridge, supra, as an example. It is submitted that the Arizona Court of Appeals totally misconstrued and misapplied the Matthews Decision. Under the stringent procedural guidelines set forth in Matthews, there was a clear violation of due process requirements and deprivation of rights by the ex-parte, unilateral and retroactive termination of compensation benefits by Sandoval's employer.

The Arizona Court of Appeals further concluded that Sandoval had a "meaningful" opportunity to be heard after the ex-parte termination of temporary benefits because he gets "full retroactive relief if he ultimately prevails." Such a conclusion is in direct conflict with both the majority and dissenting opinions in Dillard when such a hearing takes more than two years to complete, and more than 3-1/2 years before an Award is finally made (showing retroactive disability benefits to the extent of \$13,800 were due from August, 1973 to present). The fact that the employer has now filed objections to the retroactive award and a hearing has not yet been set on those objections will again result in many months, and possibly years, delay before the disabled employee and his family finally receive the benefits to which they were entitled during the past 3-1/2 (going on 4) years.

The conclusions reached by the Arizona Court that "while procedurally this determination may

result in the interruption of benefits, all benefits which the claimant will be entitled to under his permanent status are paid retroactively to the date of termination of temporary benefits," does not correct the fact that "... the ex-parte proceeding permitted . . . may result in cessation of milk delivery, or electric power, or fuel to the working man and his family . . . [during] a time which could not be less opportune." (416 U.S. 801.)

2. The Delegation of Powers to the Defendant-Employer To Administer and Even To Suspend A Disabled Employee's Compensation In Arizona is Obnoxious To All Constitutional Guarantees of Due Process and Equal Protection.

The State's delegation of powers to the employer to suspend or terminate the employee's compensation, delegates to a private party in the proceeding the power to regulate the affairs of its adversary on the Workmen's Compensation claim. Such a delegation of governmental powers was commented on in Carter v. Carter Coal Company, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936),

where the power to fix hours and wages of miners was delegated to producers and miners, as follows:

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. . . . [I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor."

Allowing one of the parties in a Workmen's Compensation proceeding to make determinations and decisions in which that party has a vested monetary interest, and not allowing the employee to make such decisions or determinations, violates the constitutional mandate of equal protection and due process. The possibility of arbitrary action under a law, rule, or procedure, whether occasioned by the express terms of a law, or by its improper execution, or its effect in operation, violates due process. An actual discrimination arising from the method of administering a law is as potent in creating a denial of equality of rights as a discrimination made by the law itself. The validity of a State statute under the equal protection clause thereof often depends

on how it is construed and applied. See: Concordia F. Insurance Co. v. Illinois, 292 U.S. 535, 78 L.Ed. 1411, 54 S.Ct. 830; and 16 AmJur2d, Constitutional Law, §§ 419-423.

3. Termination of A Disabled Employee's Compensation Without Giving Required Notice Until Over Four Months Later, Deprives the Employee of Due Process of Law.

A Notice of Claim Status is not effective until properly served upon the employee. A four month delay in service therefore precludes his right to a hearing for an additional four months.

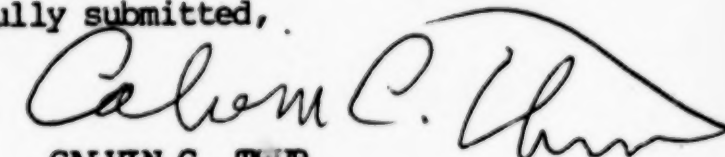
Retroactive application of determinations and decisions which terminate compensation benefits violate due process, as per Goldberg, Matthews, and Dillard, all supra. See also: Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and Robinson v. Hanrahan, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972).

CONCLUSION

For the reasons stated, a Writ of Certiorari

should issue to review the constitutionality of the Arizona Statutes and procedures employed in Workmen's Compensation cases, and the Judgment and Opinion of the Arizona Court of Appeals on which the Arizona Supreme Court denied review.

Respectfully submitted,



CALVIN C. THUR
7020 E. Third Avenue,
Suite One
Scottsdale, AZ 85251
Attorney for Petitioner

NOTICE OF CLAIM STATUS

(Carrier's Name and Address)

SALT RIVER POWER
DISTRICT
% SWETT & CRAWFORD
705 FIRST FEDERAL BLDG.
3003 NO. CENTRAL AVENUE
PHOENIX, ARIZONA 85012

Date Mailed 8-31-73
Soc. Sec. No. 526-62-6275
Date Injured 9-7-71
Carrier Claim No. 8-71-185
Carrier Policy No. Self-Insur
Employer Salt River Powe
District

Mail to:

Industrial Commission of Arizona
P. O. Box 19070
Phoenix, Arizona, 85005

And to:

Claimant by Certified Mail

Mr. Ausbert Sandoval
3320 East Monte Vista
Phoenix, Arizona 85008

(Claimant's Name and Address)

1. ☐ Accepted for benefits as accidental injury claim.
2. ☐ Accepted for benefits as occupational disease claim.
3. ☐ Denied as both accident and occupational disease claims.
4. ☐ Denied as accident claim.
5. ☐ Denied as occupational disease claim.
6. ☐ Enclosed check \$_____ covers time lost, commencing _____ through _____
From this 7 days have been deducted unless the disability has extended through 14 days. Payment has been made on a monthly wage of \$_____ based on the following:
 - A. ☐ Statutory minimum or estimated monthly wage pending determination of Average Monthly Wage within 30 days.
 - B. ☐ Average monthly wage at time of injury or exposure (See attached calculation), subject to the final determination by The Industrial Commission of Arizona within 30 days.
7. ☐ Amount of compensation changed to 65% of the difference between average monthly wage before injury or exposure and the wage applicant is able to earn after date of release for work, effective _____
8. ☒ Temporary compensation terminated on 8-7-73 because claimant has been released for, or has returned to, regular work without wage loss due to injury.
9. ☒ Medical benefits terminated on 8-7-73 because:
 - A. ☐ Claimant was discharged with no permanent disability.
 - B. ☒ Claimant was discharged with permanent disability. (Amount of permanent benefits, if any, will be given by subsequent notice).
 - C. ☐ No time was lost from work in excess of 7 days attributable to this injury or exposure.
10. ☐ Petition to reopen:
 - A. ☐ Accepted.
 - B. ☐ Denied.
11. ☐ Other: ljh cc: Dr. William C. Brainard

NOTICE TO CLAIMANT:

If you are aggrieved by this notice, you may apply for a hearing by filing a written application at any office of The Industrial Commission of Arizona within sixty (60) days after the date of mailing of this notice.

Phoenix Office: Industrial Commission of Arizona
1601 West Jefferson St.
Phoenix, Arizona

Tucson Office: Industrial Commission of Arizona
721 North 4th Avenue, Second Floor
Tucson, Arizona, 85705

Mail to: P. O. Box 19070
Phoenix, Arizona, 85005

(Authorized Signature)

Form ICA 04-0104-71

(This form approved by The Industrial Commission of Arizona for carrier use)

APPENDIX "A-1"

BEST COPY AVAILABLE

JOHN S. SCHAPER
ATTORNEY AT LAW
2502 FIRST FEDERAL SAVINGS BUILDING
3003 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85012
TELEPHONE 802/284-8805

RECEIVED
GILES, ZIELINSKI
& THUR

JAN 8 1974

January 7, 1974

Mr. Calvin C. Thur
Giles, Zielinski & Thur
7020 E. Third Avenue, Suite 1
Scottsdale, Arizona 85251

Re: Ausbert S. Sandoval
ICA No. 1/3-12-10

Dear Cal:

Following your call last week concerning the above matter, I reviewed the insurance carrier's file.

If it is now your feeling that this claim was not properly closed in August, I would suggest that you file a request for hearing with the Industrial Commission. Since the notice was apparently not sent to you when the case was closed, I would probably raise no objections as to the timeliness of the request for hearing. However, there may be a number of questions concerning the jurisdiction of the Commission while this matter is pending in the Court of Appeals, as well as those questions concerning Mr. Sandoval's need for medical treatment after August 14, 1973.

Would you please provide me with a copy of any documents you may file with the Commission.

Very truly yours,

John S. Schaper

JSS:jg

APPENDIX "A-2"

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

P. O. BOX 19070
PHOENIX, ARIZONA 85005

✓ <u>AUSBERT S. SANDOVAL</u> Applicant,	Case No. <u>1/3-12-10</u>
VS.	Carrier Claim No. <u>SP 71-185</u>
<u>SALT RIVER PROJECT</u> Defendant Employer,	FINDINGS AND AWARD FOR UNSCHEDULED PERMANENT PARTIAL DISABILITY
<u>SALT RIVER PROJECT Z BURNHAM OF ARIZONA</u> Defendant Insurance Carrier,	Under the Provisions of A.R.S., Sections 23-1044 C, D, E and F.

On October 23, 1975, this Commission issued its Decision Upon Hearing and Findings and Award For Temporary Disability Benefits, which was affirmed by REVIEW on February 10, 1976.

Thereafter, the applicant, through counsel, filed Petition of Writ of Certiorari. After due consideration, the Court of Appeals, State of Arizona, Division One, affirmed the afore-mentioned award by MANDATE.

The Commission having fully considered the file, records and all evidence hereunto appertaining now makes its Findings and Award For Unscheduled Permanent Partial Disability as follows:

FINDINGS

1. That the above-named applicant sustained personal injury by accident arising out of and in the course of his employment on September 7, 1971.
2. That applicant's physical condition became stationary on August 24, 1973.
3. That applicant is entitled to accident benefits (medical expenses) through August 24, 1973.
4. That the Commission finds that said applicant has sustained a 20% general physical functional disability as a result of said injury by accident of September 7, 1971.
5. That the applicant has sustained a 77.92% reduction in his monthly earning capacity, entitling him to the sum of \$378.56 per month until death or further order or award of The Industrial Commission of Arizona pursuant to the provisions of A.R.S., Section 23-1044, or other applicable law.

APPENDIX "A-3"

AUSBERT S. SANDOVAL
1/3-12-10

6. That in determining that applicant has a reduced monthly earning capacity as a result of injury by accident, this Commission has given full consideration to each of the matters set forth in A.R.S., Section 23-1044, D, and full consideration to all other facts and circumstances pertaining to this case.

7. That the aforesaid determination is based on the following facts:

- (a) That applicant is presently 35 years of age.
- (b) That applicant has completed 14 years of formal education.
- (c) That applicant is unable to return to his former employment as a result of his injury.
- (d) That medical limitations would not preclude applicant from performing the duties of a small appliance repair/light handyman or comparable work and in accordance with the pay scale in effect at time of injury earn an average of \$194.99 a month, thereby sustaining the above-stated loss of earning capacity.

AWARD

Award is hereby made payable to said applicant by the above-named defendant insurance carrier as follows:

1. Compensation for unscheduled permanent partial disability under A.R.S., Section 23-1044, C & D, in the sum of \$378.56 payable monthly, to continue until death or further order or award of this Commission, the first payment effective as of August 1973; deducting any amounts advanced under the provisions of Form ICA-0107 issued August 31, 1973.

IT IS ORDERED that the Commission retains jurisdiction of all compensation cases for the purpose of altering, amending or rescinding its findings and award on the motion of either the workman, the insurer, or the employer, (1) upon showing a change in the physical condition of the workman subsequent to said findings and award arising out of said injury resulting in the reduction in the earning capacity; (2) upon showing of a reduction in the earning capacity of the workman arising out of said injury where there is no change in his physical condition, subsequent to findings and award; (3) upon a showing that his earning capacity has increased subsequent to said findings and award.

IT IS FURTHER ORDERED that the applicant shall, while receiving permanent compensation benefits, report on the anniversary date of this award to this Commission, all of his earnings for the prior twelve month period.

AUSBERT S. SANDOVAL
1/3-12-10

IT IS FURTHER ORDERED if you do not agree with this award, and wish a hearing on the matter, your written Request For Hearing must be received in either office of The Industrial Commission of Arizona within SIXTY (60) DAYS after the mailing of this award, pursuant to A.R.S., Section 23-941 and 23-947. IF NOT SUCH APPLICATION IS RECEIVED WITHIN THAT SIXTY DAY PERIOD, THIS AWARD IS FINAL.

THE INDUSTRIAL COMMISSION OF ARIZONA

BY Margaret Right
CLAIMS MANAGER

Signature authorized pursuant to
Commission Resolution A.R.S. 23-108.03

Dated at Phoenix, Arizona,

March 28, 1977

ATTEST: [Signature]
ASSISTANT SECRETARY

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

IMPORTANT — Read information on reverse side before completing this Request. This Request must be completed in detail and additional pages may be used if necessary.

AUSBERT S. SANDOVAL

REQUEST FOR HEARING

vs.

Applicant,

SALT RIVER PROJECT

ICA Claim No. 1/3-12-10

Defendant Employer,

SALT RIVER PROJECT

Ins. Carrier Claim No. SP 71-185

c/o BURNHAM OF ARIZONA

Defendant Insurance Carrier

COMES NOW the self-insured defendant employer

(Party Requesting Hearing)

and pursuant to A.R.S., Section 23-941 and in accordance with Rules 35, 36, 41, 47 and 55 of the Rules of Procedure Before The Industrial Commission of Arizona, the texts of which appear on the reverse hereof, requests a hearing on the: (Check appropriate box)

- () Notice of Claim Status issued by the _____
or
(X) Notice, Award, Order or Decision entered by The Industrial Commission of Arizona,

on March 28, 19 77, which is arbitrary, unjust, unlawful and not supported by the evidence for the following reasons: (State in detail why you feel you are aggrieved)

The applicant has not sustained a loss of earning capacity in the amount or to the extent as set forth in the Findings and Award for Unscheduled

Permanent Partial Disability entered by the Industrial Commission of Arizona on March 28, 1977.

Hearing requested at city of town of Phoenix Estimated length of time for hearing 1/2 day

Number of witnesses 3

Pursuant to Rule 35, the party hereby requests that subpoenas be issued to the following witnesses:

(a) Names of witnesses to be subpoenaed will be supplied subsequently.

(b) _____ (Name) _____ (Address)

(c) _____ (Name) _____ (Address)

(d) _____ (Name) _____ (Address)

WHEREFORE, it is requested that a time and place be fixed for hearing. The undersigned hereby states that he/she has read the matters contained on the reverse side of this Request for Hearing prior to completing same.

DATED the 18 day of April, 19 77

copy of the foregoing mailed to

Calvin C. Thur
THUR, PRESTON & HUNGERFORD
7020 E. 3rd Ave., Suite 1
Scottsdale, AZ 85251

John S. Schaper

Signature of Party or Authorized Representative Attorney for self-insured

215 E. Lexington Ave.

Party's Address Street

Phoenix, Arizona 85012

City State Zip

IMPORTANT — Read information on reverse side before completing this Request for Hearing. This Request for Hearing must be completed in detail and filed at an office of The Industrial Commission of Arizona.

Appendix A-5

OPINION OF THE

COURT OF APPEALS OF ARIZONA,
Division 1,
Department C.

As Reported in 559 P.2d 688 (1976)

Ausbert S. SANDOVAL, Petitioner,

v.

The INDUSTRIAL COMMISSION of
Arizona, Respondent,

Salt River Power District,
Respondent Employer,

Salt River Power District,
Respondent Carrier.

No. 1 CA-IC 1498.

Court of Appeals of Arizona,
Division 1,
Department C.

Decided Dec. 9, 1976.

Rehearing Denied Jan. 12, 1977.

Review denied Feb. 1, 1977.

Claimant sought a writ of certiorari to review

ii

Appendix A-5

the lawfulness of an award of the Industrial Commission, Claim No. 1/3-12-10, which found that his condition had passed from a temporary to a permanent status. The Court of Appeals, Jacobson, Acting P. J., held that the notice of claim status was not void because the form contained printed language which stated that the employee "has returned to regular work without wage loss due to injury," which inaccurately described the claimant's actual situation; that the Industrial Commission's determination that the claimant's condition was stationary was supported by sufficient evidence; that the notice of claim status was not void because of a four-month delay between its issuance and its receipt by the claimant's attorney; and that no due process hearing was required prior to determination by the employer or its carrier that the claimant's condition had passed from a temporary to a permanent status, where the claimant was given an opportunity to adequately contest that determination.

Affirmed.

1. Workmen's Compensation [Key No.] 2021

Notice of claim status sent by employer to claimant was not invalid because form contained printed language which stated that claimant "has returned to regular work without wage loss due to injury," which inaccurately described claimant's actual situation.

2. Workmen's Compensation [Key No.] 230

Workmen's compensation benefits can be provided only if claimant is properly within coverage of statute. A.R.S. § 23-1021.

3. Workmen's Compensation [Key No.] 2003

Injured workman's condition becomes stationary when it has reached relatively stable status so that nothing further in way of medical treatment is indicated to improve that condition.

4. Workmen's Compensation [Key No.] 2030

Industrial Commission's determination that claimant's condition was stationary and that his right to temporary compensation and medical

benefits was properly terminated was supported by sufficient evidence.

5. Workmen's Compensation [Key No.] 2021

Notice of claim status sent to workmen's compensation claimant was not void because of four-month delay between its issuance and its receipt by claimant's attorney, but delay in service merely provided legal excuse for not timely filing request for hearing.

6. Workmen's Compensation [Key No.] 2039

No due process hearing was required prior to determination by employer or its carrier that workmen's compensation claimant's condition had passed from temporary to permanent status, where claimant was given opportunity to adequately contest that determination. U.S.C.A.Const.

Amends. 5, 14; A.R.S. §§ 23-1044, 23-1047.

7. Workmen's Compensation [Key No.] 1990

Only Industrial Commission, not carrier or employer, has right to terminate permanent benefits.

Thur, Preston & Hungerford by Calvin C. Thur, Scottsdale, for petitioner.

John H. Budd, Jr., Chief Counsel, The Industrial Commission of Arizona, Phoenix, for respondent.

John S. Schaper, Phoenix, for respondent employer and carrier.

OPINION

JACOBSON, ACTING Presiding Judge.

On review of this Workmen's Compensation award several issues are presented: (1) Is the Notice of Claim Status void because the form contained printed language which stated that the employee "has returned to regular work without wage loss due to injury"¹ which inaccurately described the claimant's actual situation? (2) Is the Industrial Commission's determination that the petitioner's condition was stationary in August, 1973,

¹This form, Industrial Commission of Arizona (ICA) form No. 04-0104-71 is no longer used by the Commission, and the language to which the petitioner objects does not appear in the form currently used by the Commission.

supported by the evidence? (3) Is the Notice of Claim Status void because of a four month delay between its issuance and its receipt by the petitioner's attorney? (4) Was the petitioner deprived of due process by the unilateral termination of temporary benefits by the self-insurer's insurance carrier?

As a prelude to an examination of these issues it will be illuminating to review the relevant procedural framework. Petitioner, Ausbert S. Sandoval, sustained an injury on September 7, 1971 while in the employ of the self-insurer respondent employer, Salt River Power District. Petitioner's claim was accepted for Workmen's Compensation benefits with a calculation of Average Monthly Wage approved by the Industrial Commission on November 15, 1971, and payment of benefits commenced as of the date of the injury. By Notice of Claim Status issued August 9, 1972, the respondent employer terminated both temporary compensation benefits, effective July 23, 1972,

and medical benefits, effective August 4, 1972. A timely Request for Hearing on this issue was filed and a hearing ensued on December 4, 1972. On this date, the parties, by stipulation, agreed that the petitioner was entitled to remain on temporary disability status from July 23, 1972 until the date his condition became stationary. A Decision of the Hearing Office ratified this agreement.

On January 24, 1973, petitioner filed an Objection to the Determination of Average Monthly Wage and requested a hearing on this issue. On June 11, 1973, a hearing was conducted and the decision rendered August 6, 1973 dismissed the Request for Hearing and the objections to the determination of Average Monthly Wage. Following post-decision procedures, the petitioner sought review of this decision by the Court of Appeals and this court, by memorandum decision (1 CA-IC 1044, filed December 3, 1974), affirmed the decision of the Industrial Commission. Prior to the petitioner's seeking the above-mentioned review,

the respondent employer on August 31, 1973, issued a Notice of Claim Status terminating both temporary compensation benefits, effective August 8, 1973, and medical benefits, effective August 24, 1973. Concurrently, with that notice the employer advised the Commission that the petitioner had suffered a permanent disability, and a request was directed to the Commission to determine permanent benefits, pursuant to A.R.S. § 23-1047. However, a copy of the August 31, 1973 Notice of Claim Status was not received by the petitioner's attorney until January, 1974. On January 15, 1974, the petitioner filed Objections to this Notice of Claim Status and requested a hearing. The Commission declined to institute action on either the Request for Hearing or the request for determination of permanent partial disability benefits, being of the opinion that it lacked jurisdiction while an appeal was pending in the Court of Appeals. On April 16, 1974, this court issued its opinion in Castillo v. Industrial

Commission, 21 Ariz.App. 465, 520 P.2d 1142 (1974), specifically determining that the Commission could exercise jurisdiction in a matter pending before the court in circumstances factually similar to the instant case.

Following the Court of Appeals memorandum decision which affirmed the hearing officer's decision on the determination of Average Monthly Wage, the petitioner instituted an action on April 14, 1975 in Maricopa County Superior Court asserting an assortment of claims against the respondent employer and Swett and Crawford, the managing agent for the self-insured respondent employer. On October 24, 1975 judgment was entered adversely to the petitioner and this judgment is the subject of a separate civil appeal currently pending before this court.

On June 3, 1975 a hearing was conducted pursuant to the petitioner's request of January 15, 1974 objecting to the August 31, 1973 Notice of Claim Status. On October 23, 1975 the hearing officer

found that the petitioner's condition became medically stationary on August 24, 1973; that the August 31, 1973 Notice of Claim Status was correct; that it was fully supported by the evidence, and denied all the petitioner's objections to this Notice of Claim Status. Following administrative review procedures which affirmed the decision of the hearing officer, the instant review by certiorari was lodged.

[1] Petitioner first contends that the Notice of Claim Status which stated that the employee "has returned to regular work without wage loss due to injury"² was knowingly false and therefore void. We are somewhat at a loss to understand what petitioner contends is the effect of that voidness, since he requested a hearing as to that Notice of Claim status, which has the effect of suspending its operation and put in issue the subject of the notice--in this case whether

²This form language was mandated for use by the Commission pursuant to Rules 6 and 7, Rules of Procedure for Workmen's Compensation hearings.

petitioner's condition had passed from a temporary state into one of permanency. Massie v. Industrial Commission, 113 Ariz. 101, 546 P.2d 1132 (1976). If his contention is that the employer must continue the employee on a temporary status until a "proper" Notice of Claim Status is issued, he is mistaken. It is important to note at this point that there is no contention that petitioner was misled by this notice which operated to deprive him of any procedural rights.

[2-4] It is also crucial to note that a claimant's entitlement to benefits for industrial injuries flows from the statutory scheme as provided in our Workmen's Compensation Act. Danner v. Industrial Commission, 54 Ariz. 275, 95 P.2d 53 (1939). In particular, A.R.S. § 23-1021 details the benefits to which an injured industrial worker is entitled and these benefits can be provided only if a claimant is properly within the coverage of the statute. Danner, supra; Lewis v. Industrial Commission, 2 Ariz.App.

522, 410 P.2d 144 (1966). Accordingly, any rights which the claimant may possess as to benefits spring from the statute and not from the language contained in or omitted from a particular form which was provided by the Commission. The issue thus devolves into whether the petitioner was entitled to temporary disability benefits after August 24, 1973 or whether his condition had become stationary thus precluding temporary disability benefits but entitling him to permanent benefits. The principle is well established in workmen's compensation proceedings that an injured workman's condition becomes stationary when it has reached a relatively stable status so that nothing further in the way of medical treatment is indicated to improve that condition. Home Insurance Co. v. Industrial Commission, 23 Ariz.App. 90, 530 P.2d 1123 (1975). The record provides medical testimony as to the stationary nature of petitioner's status as follows:

[testimony of Dr. William C. Brainard]

"Q. I want to clarify when it was that you felt he [claimant Sandoval] had reached a position where no further orthopedic treatment would be indicated. Is that as of August 8, 1973?

"A. That's the first time I noted that.

* * * * *

"Q. In other words, he was in as stable and stationary from the standpoint of his underlying physical condition that you felt he would be?

"A. Other than just supportive care for his pain.

* * * * *

"A. That's true, but there comes a point in time when one must say that even if there are undulations in the amount of pain and discomfort that it still has to be considered a stationary condition."

Based upon this exchange and our review of the record we are able to say that the petitioner's right to temporary compensation and medical benefits was properly terminated by the Notice of Claim Status issued August 24, 1973 upon petitioner's achieving a stationary status.

[5] Petitioner next contends that a four month delay between the issuance of the Notice of Claim

Status and the date it was served upon the petitioner's attorney voided the Notice of Claim Status and deprived the petitioner of his due process of law.

In our opinion, the delay in service does not void the Notice of Claim Status, but merely provides a legal excuse for not timely filing a Request for Hearing. See MRF Construction Co. v. Industrial Commission, 111 Ariz. 466, 532 P.2d 528 (1975); Sill v. Industrial Commission, 12 Ariz.App. 6, 467 P.2d 81 (1970). However, the untimeliness of the filing of the Request for Hearing on this delayed Notice of Claim Status was not raised by the respondent employer and petitioner subsequently was granted a hearing pursuant to his request and was provided a full opportunity to present the merits of his claim. Contrary to petitioner's assertion, the due process requirements of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) have been complied with in the

instant circumstances. Mullane requires notice reasonably calculated to apprise interested parties of the pendency of the action and to afford the opportunity to present objections, and not necessarily an adherence to a mechanistic procedural scheme. Herein, the issue of untimely filing of the Request for Hearing having not been raised, and the subsequent opportunity to present objections having been provided, we are unable to say that the delay in service upon the petitioner's attorney of the Notice of Claim Status prejudiced the petitioner's due process rights.

[6] Lastly, the petitioner argues that the unilateral termination of temporary benefits by the self-insured respondent employer's insurance carrier deprived him of his constitutional right to due process of law. Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the due

process clause of the fifth or fourteenth amendments to the United States Constitution. Assuming that the interest of the petitioner in the continued receipt of his temporary compensation benefits under the Workmen's Compensation Act is a statutory "property" interest properly protected by the United States Constitution, the Supreme Court of the United States has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974); see, e. g., Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). However, the fundamental requirement of due process is an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Here, the Notice of Claim Status which terminated temporary compensation benefits was

objected to by the petitioner and a full evidentiary hearing concerning these objections was conducted on June 3, 1975. As a result of this hearing, the hearing officer found that the petitioner's condition became medically stationary on August 24, 1973; that the Notice of Claim Status was correct, and that the Notice of Claim Status which terminated temporary compensation benefits was fully supported by the evidence. Since the petitioner was accorded an opportunity to be heard "meaningfully" in a full evidentiary hearing before final termination of temporary compensation benefits we are unable to say that the procedure utilized constituted a deprivation of due process of law.

Since a recipient whose benefits are terminated by the Notice of Claim Status is awarded full retroactive relief if he ultimately prevails his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. In this regard, the

petitioner contends his potential injury is similar to that of the welfare recipient in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) which required a due process hearing prior to interruption of benefits. In our opinion, the effect of Goldberg in this area has been weakened by subsequent United States Supreme Court decisions. See Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv.L.Rev. 1510 (1975). Thus, in the recent decision of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court concluded that due process does not require an evidentiary hearing be conducted prior to the termination of social security disability benefits.

[7] In any event, the cessation of temporary benefits may or may not have the effect of terminating compensation. Rather, this determination is merely a shift under the statutory scheme from benefits to which the claimant is entitled

while his condition is temporary to benefits he may be entitled to when his condition becomes permanent. While procedurally this determination may result in the interruption of benefits, all benefits which the claimant will be entitled to under his permanent status are paid retroactively to the date of termination of temporary benefits. See, A.R.S. §§ 23-1044 and 23-1047. Only the Commission, not the carrier or the employer, has the right to terminate permanent benefits. Harbor Insurance Co. v. Industrial Commission, 24 Ariz. App. 197, 537 P.2d 34 (1975). It is to be noted that simultaneously with the Notice of Claim Status terminating temporary benefits, the employer requested the Commission to determine petitioner's permanent benefits. That the Commission has not done so can be laid directly to the pursuit by the petitioner of reviews to this court.

In short, we find no due process hearing is required prior to a determination by the employer or its carrier that a claimant's condition has

passed from a temporary to a permanent status, provided the claimant is given an opportunity to adequately contest that determination.

The award of the Industrial Commission is affirmed.

HAIRE, C.J. and SCHROEDER, J., concur.

SUPREME COURT
STATE OF ARIZONA
PHOENIX

AUSBERT S. SANDOVAL,)	
)	
Petitioner,)	February 2, 1977
)	
vs.)	
)	
THE INDUSTRIAL COMMISSION)	Supreme Court
OF ARIZONA,)	No. 1 CA-IC 1498
)	
Respondent,)	
)	
SALT RIVER POWER)	Industrial Commission
DISTRICT,)	No. 1/3-12-10
)	
Respondent)	
Employer,)	
)	
SALT RIVER POWER)	
DISTRICT,)	
)	
Respondent)	
Carrier.)	
)	

The following action was taken by the Supreme Court of the State of Arizona on February 1, 1977 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 2nd day of February, 1977.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins

Deputy Clerk